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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6742

FELIPE JUAREZ HURTADO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 40–46) is reported at 452 F. 2d 951.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1971 (App. 47). A petition for rehearing was denied on March 1, 1972 (App. 48). The petition for a writ of certiorari was filed on May 30, 1972, and was granted on October 10, 1972 (App. 49). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the witness fee provisions of 28 U.S.C. 1821 entitle petitioners, deportable Mexican aliens, to the payment of twenty-one dollars per day for time spent in custody as material witnesses.

2. Whether, if the statute does not authorize such payment, its payment provisions are unconstitutional as applied to the petitioners.

STATUTES INVOLVED

28 U.S.C. 1821 provides:

> § 1821. Per diem and mileage generally; subsistence.
>
> A witness attending in any court of the United States, or before a United States Commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $20 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 10 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $16 per day for expenses of sub-

sistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided,* That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further,* That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day.

Witnesses in the district courts for the districts of Canal Zone, Guam, and the Virgin Islands shall receive the same fees and allowances provided in this section for witnesses in other district courts of the United States.

Rule 46 of the Federal Rules of Criminal Procedure provides in pertinent part:

* * *

(b) Bail for Witness.

If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody

of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

18 U.S.C. 3149 provides:

§ 3149. Release of material witnesses.

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

INTRODUCTION AND STATEMENT

This is a civil suit brought by petitioners in the United States District Court for the Western District of Texas. They sued on behalf of themselves and the alleged class of deportable Mexican aliens held as material witnesses and paid only one dollar per day of confinement (App. 28–30, 35–36). Petitioners contended that 28 U.S.C. 1821 should be construed to require payment of a total of $21 per day to material witnesses in custody, or in the alternative that the dollar per day limitation should be found unconsti-

tutional as a denial of Fifth Amendment rights to just compensation, due process, and equal protection and as the imposition of involuntary servitude in violation of the Thirteenth Amendment. They sought money damages under the Tucker Act, 28 U.S.C. 1346(a)(2), as well as declaratory and injunctive relief (App. 31–32).

This case was submitted and decided on cross-motions for summary judgment, since all that was at issue were questions of law. The underlying facts—that petitioners are Mexican aliens who entered the United States illegally and were deportable as such and were, for a period prior to deportation, held as material witnesses in the prosecution of the persons who smuggled them into this country—were not placed in issue by the pleadings. Although we do not suggest that additional facts are in any way necessary to the resolution of the case at this stage, we believe the Court may find pertinent some additional information on the background of the case. The following statement is based on certified public records "whose accuracy cannot reasonably be questioned," including the files of the district court in which this suit was brought; these facts therefore seem to be an appropriate subject for judicial notice. See Rules 201 (b)(2) and (d) of the new Federal Rules of Evidence, which express the prevailing practice. The background facts, which will be discussed briefly below, are set forth in two sets of papers we are lodging with the Clerk: (1) certified copies of documents on file in the United States District Court for the Western Dis-

trict of Texas [1] and (2) a certified resume of administrative processing of petitioners by the Immigration and Naturalization Service. These consecutively paginated documents are hereinafter referred to as "D. 1" through "D. 21." [2]

1. Petitioners Felipe Juarez Hurtado and Ramon Avila Hurtado

Petitioners Felipe Juarez Hurtado and Ramon Avila Hurtado, along with others including Thomas Lopez and Santos Casarez, were apprehended by United States Immigration and Naturalization Service Border Patrol agents near Alpine, Texas, on March 8, 1970 (D. 6). On the same day, after admitting to the arresting officers that they had entered the United States without inspection, in violation of 8 U.S.C. 1251(a)(2), both Felipe and Ramon Hurtado were served with an Order to Show Cause why they should not be deported, Notice of Hearing, and Warrant for Arrest, and were taken to the El Paso Immigration and Naturalization Detention Facility, El Paso, Texas, where they were detained, having been unable to post a bond of $1,000 (D. 19).

On March 9, 1970, a criminal complaint was filed against Lopez and Casarez in the United States District Court for the Western District of Texas (D. 6) charging them with the felony of knowingly smuggling

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[1] The documents are on file in the cases of *United States* v. *Casarez* and *Lopez*, P-70-CR-55; *United States* v. *Ramon Avila Hurtado*, P-70-CR-63; *United States* v. *Felipe Juarez Hurtado*, P-70-CR-64; *United States* v. *Herrera*, EP-70-CR-537.

[2] Copies of these lodgings are being furnished to counsel for petitioners.

aliens into the United States, in violation of 8 U.S.C. 1324(a)(2). On March 19, 1970, an information was filed against petitioners Felipe and Ramon Hurtado, P–70–CR–63, charging them with illegally entering the United States in violation of 8 U.S.C. 1325 (D. 10, 11). Consequently, the Hurtados were remanded to the custody of the United States Marshal (D. 19). On March 18, 1970, the Hurtados were advised that pursuant to their request, and based on their admissions of illegal entry and the provisions of 8 U.S.C. 1252 (b), they were granted the privilege of voluntary departure from the United States and the administrative deportation hearing previously scheduled was taken off the calendar (D. 19). On March 26, 1970, the Hurtados pleaded guilty to the misdemeanor of illegal entrance (8 U.S.C. 1325) and they were sentenced to six months' imprisonment, the execution of which was suspended, and they were put on unsupervised probation for one year (D. 10, 11).

On March 18, 1970, a superseding information was filed against Lopez and Casarez (P–70–CR–55), charging them in three counts with aiding and abetting the illegal entry of the Hurtados and another alien, in violation of 8 U.S.C. 1325 and 18 U.S.C. 2 (D. 1). Based on an affidavit filed in accordance with Rule 46(b), Fed. R. Crim. P., which recited that the Hurtados were essential and material witnesses and that it appeared "impractical to secure their presence by subpoena at such time as the case is called for trial for the reason that they will be without the jurisdiction of the United States," the United States Com-

missioner, on March 26, 1970, committed them to the custody of the United States Marshal for failure to post adequate bond, pending final disposition of the case against Lopez and Casarez (App. 20, D. 3). On June 15, 1970, Casarez and Lopez pleaded guilty to three counts of the information (D. 1).[3] That same day, petitioners Felipe and Ramon Hurtado were released by the United States Marshal to the custody of the Immigration and Naturalization Service, paid $1.00 per day for each day of their incarceration and, pursuant to their prior request for voluntary departure, were escorted, under safeguard, to Mexico on June 18, 1970 (App. 6, D. 19).

2. Petitioners Victor Gaucin Lazalde, Enrique Gaucin Lazalde, and Jorge Miranda Gaucin

Petitioners Victor Gaucin Lazalde, Enrique Gaucin Lazalde, and Jorge Miranda Gaucin, along with two unknown Mexican aliens and Abe Herrera, were apprehended by Border Patrol agents near El Paso, Texas, on May 25, 1970 (D. 15).[4] The Lazaldes and Gaucin all admitted to the arresting officers that they had entered the United States on May 22, 1970, near El Paso, Texas, without inspection, in violation of 8 U.S.C. 1251(a)(2) (D. 20). On the same day, a crim-

[3] They were each sentenced to three consecutive six month prison sentences, suspended on five years' probation and the payment of $1,500 in fines (D. 2).

[4] Enrique Gaucin Lazalde was a named plaintiff in the district court; he was not named as an appellant in the court of appeals or as a petitioner in this Court, but counsel for petitioners advises us that this omission was inadvertent. We shall treat him as a co-petitioner.

inal complaint was filed against Herrera in the United States District Court for the Western District of Texas charging him with knowingly and unlawfully aiding and abetting the illegal entry of these Mexican aliens into the United States, in violation of 8 U.S.C. 1325 and 18 U.S.C. 2 (D. 15). On May 26, 1970, both the Lazaldes and Gaucin were served with an Order to Show Cause why they should not be deported, Notice of Hearing, and Warrant for Arrest and taken to the El Paso Immigration and Naturalization Service Detention Facility, El Paso, Texas, where they were detained, having been unable to post a bond of $1,000 (D. 20).

On June 3, 1970, an information was filed against Herrera, EP-70-CR-537, charging him in three counts with aiding and abetting the illegal entry of the Lazaldes and Gaucin, in violation of 8 U.S.C. 1325 and 18 U.S.C. 2 (D. 12). Based on an affidavit filed in accordance with Rule 46(b), Fed.R.Crim.P., which recited that the Lazaldes and Gaucin were essential and material witnesses and that it appeared "impractical to secure their presence by subpoena at such time as the case is called for trial for the reason that they will be without the jurisdiction of the United States," the United States Commissioner, on June 11, 1970, committed them to the custody of the United States Marshal for failure to post adequate bond, pending final disposition of the case against Herrera (App. 21, D. 3).

On June 29, 1970, the Lazaldes were notified that their prior request for voluntary departure, based on

their admissions of illegal entry and the provisions of 8 U.S.C. 1252(b), had been granted and that their deportation hearings were therefore cancelled (D. 20). On July 8, 1970, Herrera pleaded guilty to all three counts of the information filed against him.* The next day the Lazaldes were released by the United States Marshal to the custody of the Immigration and Naturalization Service and were escorted to Mexico (D. 20).

On June 29, 1970, Gaucin, who had been previously granted voluntary departure from the United States under escort on May 17, 1970, and had then illegally reentered this country on May 22, was notified that his deportation hearing was scheduled to be held on July 17, 1970 (D. 20–21). On July 9, 1970, the day after Herrera entered his guilty plea, Gaucin was released by the United States Marshal to the custody of the Immigration and Naturalization Service. At his deportation hearing on July 17, 1970, he was ordered deported, and on July 18, 1970, he was deported (D. 21).

3. This Action

The case before this Court had its genesis when petitioners Felipe and Ramon Hurtado filed a motion on May 8, 1970, to intervene in the criminal prosecution against Casarez and Lopez seeking payment of witness fees of $21 rather than one dollar (D. 1). After a hearing, petitioners' motion was denied.

* On August 27, 1970, Herrera was sentenced to a $300 fine and three concurrent three-month prison terms, the execution of which was suspended upon payment of the fine, and he was placed on probation (D. 12).

Thereafter on July 2, 1970, petitioners brought an independent civil action in the same district court contending that, under 28 U.S.C. 1821, they and the class they allegedly represented were entitled to be compensated at the total rate of $21 per day rather than one dollar while incarcerated as material witnesses and that if the statute is construed to authorize the payment of only one dollar, it is unconstitutional (App. 4). Petitioners alleged that the class they represented consisted of Mexican aliens who had been paid or would be paid the sum of one dollar per day for their incarceration as material witnesses on behalf of the government, and had been or would be thereafter summarily deported to Mexico (App. 29, 36).

In its answer, the government averred that petitioners are Mexican aliens who had illegally entered the country and were held as material witnesses in connection with the criminal charges against the persons alleged to have smuggled them into the country or illegally transported them (App. 20–21, 23–24). The government also defended the dollar-a-day construction of 28 U.S.C. 1821 and the constitutionality of the statute as so construed. After a hearing held on December 14, 1970 (R. 22), the trial court took under advisement the government's motion for summary judgment (App. 25) and petitioners' cross-motion for summary judgment (App. 34) and their motion for a three-judge court (App. 36). On April 8, 1971, the trial court overruled petitioners' motion for a three-judge court on the ground that no substantial federal question was presented (App. 38), and granted sum-

mary judgment for the government (App. 39). The court of appeals affirmed, finding that a witness in custody is not entitled under 28 U.S.C. 1821 to the $20 witness fee, in addition to the one dollar per day, when not in attendance in court, and also held that the statute as so construed is constitutional (App. 40–46).*

SUMMARY OF ARGUMENT

The plain language of 28 U.S.C. 1821 provides only one dollar per day to detained witnesses while they are not in attendance in court. The $20 per diem provided by the first paragraph of the section is only available to witnesses, whether incarcerated or not, while they

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*The government opposed (App. 4, 20) petitioners' request (App. 28–30, 33, 35–36) that the district court declare that the suit was properly brought as a class action under Rule 23 of the Federal Rules of Civil Procedure. The district court never explicitly ruled on the Rule 23 issue and the court of appeals did not discuss it. We note, however, that aggregation of the claims of the individual members of petitioners' purported class would place the amount of money damages sought well over the $10,000 subject-matter jurisdictional limit on the district court's power under the Tucker Act, 28 U.S.C. 1346(a)(2), to hear such claims. It could be argued, therefore, that the suit should properly have been brought in the Court of Claims. 28 U.S.C. 1491; *United States* v. *Sherwood*, 312 U.S. 584, 587. Compare *Snyder* v. *Harris*, 394 U.S. 332. But it is uncertain whether the Court of Claims, which has ruled that it has jurisdiction to accept class actions but is not required to do so, would accept jurisdiction here. See *Quinault Allottee Ass'n* v. *United States*, 453 F. 2d 1272. Since this question was not raised in or passed upon by the courts below, we do not discuss the matter further.

are actually in attendance in court or before a magistrate or a person authorized to take a deposition. Significantly, the one dollar per day provision, while stating that it is in addition to subsistence, does not state that it is in addition to the $20 per diem fee. The legislative history of the statute confirms that Congress did not intend to pay a total of $21 per day for detained witnesses while they are not in actual attendance in court.

The one dollar per day fee is constitutional as applied to the petitioners. Petitioners do not question the constitutionality of their detention as material witnesses but merely the constitutionality of their payment of only $1 per day while being detained. Congress and this Court have long recognized that the duty to appear in court is a public duty and not a compensable taking requiring just compensation. Nor were petitioners denied equal protection of the laws. The named petitioners and the class they purport to represent are illegal entrants into the United States subject to criminal charges and deportation. While actually attending in court they receive the same fee as anyone else. It was rational for Congress to provide a smaller payment for witnesses while detained but not attending in court than while attending in court. This is particularly reasonable when applied to petitioners because a payment of $21 per day to illegal entrants would constitute a windfall that might encourage illegal entrance into the United States.

491-713—72—3

ARGUMENT

I. 28 U.S.C. 1821 REQUIRES PAYMENT OF ONLY $1 PER DAY TO DETAINED WITNESSES WHILE THEY ARE NOT IN ATTENDANCE IN COURT

As the court of appeals pointed out (App. 42), petitioners have not challenged the validity of requiring material witnesses to furnish bail or the validity of incarcerating witnesses who are unable to furnish sufficient assurance of appearance. These practices, moreover, have long been upheld by this Court as necessary to assure the presence of witnesses at trial. *Blair* v. *United States*, 250 U.S. 273; *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597. The ultimate issue in the case, therefore, is a relatively limited one: whether petitioners were entitled to a total of $21 a day while they were in custody as material witnesses but not actually in attendance to give trial or deposition testimony, or whether they were entitled only to the one dollar per day they were paid. The threshold question, therefore, is one of statutory construction.[1]

Petitioners argue that while confined in a civil jail awaiting the need for their testimony, they should have been credited with the $20 per day witness fee authorized by 28 U.S.C. 1821 "for each day's attendance" "in any court of the United States," in addi-

[1] A legislative proposal by the Department of Justice to increase the per diem payment to detained witnesses will shortly be sent to the Office of Management and Budget for review.

tion to the "compensation of $1 per day" provided by the statute for "a witness [who] is detained in prison for want of security for his appearance * * *."

The plain language of Section 1821 precludes this construction. The section carefully distinguishes between two categories of witnesses. One category consists of witnesses actually "attending *in* any court of the United States, or *before* a United States Commissioner, or *before* any person authorized to take his deposition * * *." Those witnesses are entitled to a fee of $20 "for each day's attendance and for the time necessarily occupied in going to and returning from the same * * *." The other category applies to persons who are *not* in attendance or in direct transit and who therefore do not qualify for the fees. This category consists of material witnesses, like petitioners, who must be detained in custody until it is necessary for them to be brought to "attend in court."

> Where a witness is detained in prison for want of security for his [personal] appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day.

Significantly, the provision does not provide that the one dollar is *in addition* to the per diem fee—except of course for those days when the detained witness is actually in attendance—but instead it provides that the one dollar per day is the material witness's "compensation." The uniform construction of this provision in administrative application has been that the detained witness is entitled *only* to one

dollar per day, except when he is actually produced in court for testimony.[8]

This interpretation of Section 1821 is confirmed by its legislative history, which shows that Congress did not intend to provide more than one dollar per day to incarcerated witnesses when not actually attending in court. Petitioners' statutory argument appears to be that the various changes in the witness fee statutes manifest a congressional design to provide full compensation to a person for performing his public duty. This alleged objective, they argue, was originally accomplished by providing a dollar per day to a detained witness in the 1850's when that payment was first introduced. That amount, it is said, then represented

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[8] The Department of Justice, United States Marshal's Manual 340.20 (1971), provides in pertinent part:

Witnesses—Detained Witnesses.—When a witness is detained in prison for want of security for his appearance, he is entitled, in addition to his subsistence, to a compensation of $1 per day (28 U.S.C. 1821). Such persons, upon release, may be furnished with transportation and subsistence to the place of arrest or to the place of bona fide residence, if such cost is not greater than to the place of arrest (18 U.S.C. 4282).

Witnesses detained under Rule 46(b) of the Federal Rules of Criminal Procedure should be paid the compensation of $1 per day, except for the days they attend in court when they are entitled to the regular witness fee of $20.

See, also 28 C.F.R. 21.3(d), issued under the Attorney General's statutory power to set witness fees for federal courts in Alaska, which authorizes compensation to detained witnesses at the $1 per diem rate in Alaska, and specifically excepts detained witnesses from receiving the general witness fees authorized under §§ 21.3(a) and 21.3(b) of that regulation.

a fair day's wages. But that amount today, petitioners contend, is no longer reflective of a fair day's wage and thus Congress should be regarded as intending to provide that sum *in addition* to the $20 per diem fixed for witnesses in attendance in court or in transit, thus providing the detained material witness with a total of $21 for every day he is under court order, including the days in which he is neither in court nor travelling to or from court. The major premise here—that witness fees are designed to provide actual compensation for average lost wages—is faulty. The history of these provisions shows that Congress has not considered it necessary or feasible to insure a witness against lost earnings.

The incarceration of material witnesses unable to post bond sufficient to assure their eventual appearance was authorized by the Judiciary Act of September 24, 1789, c. 20, § 33, 1 Stat. 91, passed by the First Congress. The Act provided:

> * * * copies of the process shall be returned as speedily as may be unto the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment. * * *

The First Congress did not enact any specific provision providing for compensation to detained witnesses, except to state in the Act of September 29, 1789, c. 21, § 2, 1 Stat. 93, that:

> * * * modes of process and rates of fees * * * shall be the same in each state respectively as

are now used or allowed in the supreme courts of the same. * * *

Although the Fourth and Fifth Congress did authorize compensation to witnesses "attending in the courts of the United States," Act of June 1, 1796, c. 48, § 2, 1 Stat. 492; and Act of February 28, 1799, c. 19, § 6, 1 Stat. 626, no specific provision authorizing payment to detained witnesses was made until 1853. The 1853 Act, c. 80, § 3, 10 Stat. 167, provided for a payment to witnesses of $1.50 per day while attending court (and 5 cents per mile travel expense) and "[w]hen a witness is detained in prison for want of security for his appearance, he shall be entitled to a compensation of one dollar per day over and above his subsistence."

Except for special legislation for certain western states and territories (Act of May 27, 1908, c. 200, 35 Stat. 317, 377), fees to witnesses remained at the amount fixed in 1853 until 1926. In 1926 Congress provided that a witness attending in court was to receive $2 for each day's attendance and 5¢ per mile for going back and forth from his residence (c. 183, §§ 1–3, 44 Stat. 323–324).* By its explicit language, Section 1 of this Act

* Section 3 of the Act provided in pertinent part:

> Witnesses attending in such courts * * * shall receive for each day's attendance and for the time necessarily occupied in going to and returning from the same $2, and 5 cents per mile for going from his or her place of residence to the place of trial or hearing and 5 cents per mile for returning: *And provided further*, That witnesses (other than witnesses who are salaried employees of the Government and detained witnesses) in the United States courts, * * * who attend court * * * at points so far removed from their respective residences as to prohibit return thereto from day to day,

excepted all detained witnesses from the fees provided to witnesses for subsistence.[10] No provision was made for any payment at all to detained witnesses for the days spent in custody but not in actual attendance in court or in actual transit.

The House Judiciary Committee Report on the 1926 changes made it clear that Congress recognized no obligation to furnish full compensation to witnesses even for the days of actual attendance. See House Report No. 308, 69th Cong. 1st Sess. 2–3:

> While no attempt has been made in this bill to pay jurors or witnesses a sum that would be a remuneration for the time which they give to the courts in aid of the administration of justice, the committee sought to fix a sum that would relieve the situation which at present exists. Formerly there was nothing paid either to witnesses or jurors. Service as a juror is a public duty and the juror is expected to make a sacrifice in discharge of his patriotic obligation as a good citizen. Likewise, every man owes a

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shall, * * * be entitled, in addition to the compensation provided by existing law, as modified by this Act, to a per diem of $3 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to attend court and return home.

[10] Section 1 provided in pertinent part:

That jurors and witnesses (other than witnesses who are salaried employees of the Government, *and detained witnesses*) in the United States court, * * * who attend, * * * *shall be entitled to a per diem for each day of actual attendance* and for each day necessarily occupied in traveling to attend court, * * * and return home, and, in addition, mileage as hereinafter provided. [emphasis added.] See, also, 28 U.S.C. (1940 ed.) 600a, 600b.

nesses) in the United States court, * * * who attend, * * *

duty to society to testify as to facts within his knowledge in connection with matters in litigation, even though it involves a personal sacrifice. The reciprocal obligation resting upon every citizen furnishes a compensation. It is one man's duty to-day and his neighbor's to-morrow.

This bill does not provide compensation nor give a bounty for jury service or service as witnesses, but merely provides fees that will approximately take care of necessary expenses. The fees fixed were arrived at after much discussion and careful deliberation. The fixing of an amount is not an easy task. The result as declared in the bill is regarded as a prudent adjustment. [Emphasis added.] [11]

A variety of changes in the *per diem* fee schedule took place in 1932, 1935 and 1942 but with no change in the philosophy of setting a figure *not based* on true compensation.[12] When the Judicial Code was revised in 1948, the provision of per diem allowances to witnesses was covered by Section 1821. 62 Stat. 950. Two dollars a day was fixed as the fee for attendance in

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[11] See also the statements of the sponsor of the bill, Congressman Burtness in the Hearings before the House Judiciary Committee, Serial 5, Fees of Witnesses and Jurors, 69th Cong., 1st Sess., February 5, 1926, 6-7.

[12] The Act of June 30, 1932, c. 314, § 323, 47 Stat. 413, reduced the per diem fee authorized to be paid to witnesses from $2.00 to $1.50 and suspended entirely the subsistence fee. The Act of March 22, 1935, c. 39, § 3, 49 Stat. 105, restored the subsistence fee, and the Act of December 24, 1942, c. 825, § 3, 56 Stat. 1088, again increased the per diem fee to $2.00. See 28 U.S.C. (1940 ed.) 600, Temporary Reduction of Fees; 1949 U.S. Code Cong. Serv. 1232.

court, but again no provision was made for any payments to be made to witnesses being detained for future appearances.

The next year, however, the dollar per day payment to confined witnesses was reintroduced, 63 Stat. 103, following a committee explanation that it had been "inadvertently omitted" from the codification. House Rep. No. 352, 81st Cong., 1st Sess. 16. By a separate measure, the per diem witness fees were increased to seven dollars a day, with an explanation that reflected a legislative desire to pay a reasonable sum to persons appearing as witnesses but one not necessarily corresponding to their actual wages. See Senate Report No. 187, 81st Cong., 1st Sess., on the Act of May 10, 1949, c. 96, 63 Stat. 65, which stated in part:

> The mere statement of the fact that the present fee for witnesses is $2 per day, subsistence is $4 per day, and the mileage is 5 cents per mile points up the present inadequacy of such amounts to fairly compensate the individual either for his time or expenses incident to his service as a witness. It is unreasonable to expect and require witnesses to attend court at a personal financial loss.
>
> The amounts arrived at in this bill are considered to be more fair than presently existing amounts, although it is recognized that certain witnesses will not, under the proposed rates, be adequately compensated. In order to fairly compensate everyone appearing as a witness it would be necessary to have either a graduated scale of fees, or, leave the amount of such fees in the discretion of the judge. Neither was con-

> sidered feasible, and therefore the amounts arrived at herein are more or less arbitrary, but considered to be reasonably fair to the average witness.

Senate Report No. 2732, 84th Cong., 2d Sess., dealing with the Act of August 1, 1956, c. 826, 70 Stat. 798–799, which increased the subsistence fee to $8 per day, increased the travel allowance to 8 cents per mile and explicitly reenacted verbatim the dollar-a-day provision stated in part:

> In support of the increase in the subsistence allowance and the mileage payment, the Department of Justice, in a letter printed in full below, cites the general increase in living costs and the cost of transportation since the establishment of the present rates in 1949.
>
> * * * * *
>
> Attached and made a part of this report is a letter, dated May 31, 1956, from the Department of Justice.

That letter stated in part:

> * * * The increase in these rates is recommended on the basis of the general increase in living costs and the cost of transportation which have taken place since that time. * * *

The letter then justifies the $4 per day fee (plus an additional $8 subsistence fee if the witness must remain overnight) on the basis of current hotel and meal costs. No part of this fee is justified as compensation to the witness for his lost time or income. See 1956 U.S. Code Cong. & Adm. News 3848–3850.

The present fee and subsistence levels were fixed in 1968. Originating in Sec. 102(j) of the Civil Rights Act

of 1957, 71 Stat. 634, 635, as amended,[13] Section 102(b) of the Jury Selection and Service Act of 1968, 82 Stat. 62, raised the per diem fee of witnesses from $4 to $20, the subsistence fee from $8 to $16 and the travel allowance from 8 to 10 cents per mile. The comment on the fee increases in Senate Report No. 891, 90th Cong., 1st Sess., p. 36, states:

> The subcommittee hearings established a record of unanimous support for increases that would make jury and witness service less burdensome. To the extent that the burden is diminished, hardship excuses may decline with consequent enhancement of representative participation on juries. * * *

The report then quoted from the testimony of the Chairman of the American Bar Association Section on Criminal Law, William Walsh, who had earlier urged that full compensation should be provided.[14] It

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[13] This section was not commented on in the House Report on the bill. House Report No. 1678, 89th Cong. 2d Sess., p. 22.

[14] Mr. Walsh, opposed the flat per diem fee increase to $20 which was subsequently adopted. He preferred a different proposed bill (§ 102 in S. 384) which would have provided much greater fees (Federal July Selection Hearings, Subcommittee on Improvements in Judicial Machinery, Senate Judiciary Committee, 90th Cong., 1st Sess., p. 106.):

> I would like to address myself briefly to what I consider to be omissions from most of the Bills now being considered.
>
> S. 384 provides that jurors shall receive at least the compensation which they would receive in their private employment. It is the only Bill which so provides and I feel that any statute on this subject should contain such a provision. It should not be a matter of financial sacrifice for a man to serve as a juror. Otherwise qualified jurors, whose

is thus apparent that when Congress increased the witness fees in 1968, it knowingly rejected the opportunity to provide full compensation for lost income to all witnesses (or jurors). Congress did not adopt a new approach which would have tied the per diem fee to lost income, but rather, as in the prior law, merely increased the flat fee rates of the old fee provisions, leaving unchanged its decision to "compensate" detained witnesses at the $1 per diem rate. In *Meadows v. United States Marshal*, 434 F. 2d 1007, 1008 (C.A. 5), certiorari denied, 401 U.S. 1014, the court held that Section 1821 does not authorize payment of witness fees to federal prisoners in the custody of the Attorney General since "they are not in a position similar to ordinary witnesses who must incur private costs in order to testify." That analysis is equally applicable here, and petitioners' statutory argument must therefore be rejected.

II. THE WITNESS FEE PROVISIONS OF 28 U.S.C. 1821 ARE CONSTITUTIONAL AS APPLIED TO PETITIONERS

A. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT JUST COMPENSATION BE PAID TO DETAINED WITNESSES

Any discussion of the constitutionality of paying a detained material witness only one dollar per day must begin with the underlying basis for this kind of confinement. The fundamental assumption of our

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salary would be affected by jury service, try to take advantage of other grounds for excuse from jury service when their real reason for requesting relief is economic hardship.

system of criminal justice is that, apart from legal privileges, "the public * * * has a right to every man's evidence." See *Branzburg* v. *Hayes*, 408 U.S. 665, 688, and cases cited. Because of this right of the public to insist, through the use of any appropriate form of compulsory process, that a person with evidence relevant to the ascertainment of truth be available to testify, special procedures to assure the presence of possibly recalcitrant witnesses were long ago developed. In England, the right to detain material witnesses for want of security can be traced at least as far back as 1554. See 1 & 2 Phillip & Mary, c. 13, § 5. We have seen above (page 17) that the First Congress authorized the federal courts to take steps necessary to insure that a material witness will be available to testify.

The commitment of witnesses like petitioners takes place only after there has been a judicial determination that their testimony may be material in a criminal prosecution *and* that it may be impracticable to secure their attendance by subpoena. See 18 U.S.C. 3149; Rule 46(b), Fed. R. Crim. P. And actual confinement is permissible only when there has been a determination by the court or magistrate that cash bail or security or other conditions of release "will not reasonably assure the appearance of the person as required." 18 U.S.C. 3146.[15] Petitioners have never challenged

[15] See *Stein* v. *New York*, 346 U.S. 156, 184: "The duty to disclose knowledge of crime * * * is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."

the lawfulness of their detention under these standards.

As material witnesses who were found unlikely to have been amenable to performance of their duty to testify, petitioners were not constitutionally entitled to any amount of compensation for their detention pending trial. As we have seen, Congress has from the earliest times treated the necessity for witnesses to appear in court, and, if necessary, to be detained, as a public duty and not a compensable taking requiring just compensation.[18] This Court has previously considered the matter and has sustained that approach.

In *Blair* v. *United States*, 250 U.S. 273, 281, the Court said:

> * * * By the same Act of 1853 (10 Stat. 167, 168), fees for the attendance and mileage of witnesses were regulated; and it was provided that where the United States was a party the marshal on the order of the court should pay such fees. Rev. Stats., §§ 848, 855. And §§ 870

[18] Although Judge Cranch permitted a detained witness to "prove her attendance" and be paid the general witness fee in *Higginson's Case*, 12 Fed. Cas. 132, No. 6,471 (C.A. D.C.), his action was neither in accord with the prior practice in England and the Colonies, nor adopted by Congress. 1 Opinions of the Attorney General, 344–345, 424, 430, 436–440; 23 Archives of Maryland (L) Proceedings and Acts of the Assembly 1752–1764 (1933) pp. ix, 91–92. In 1853 when Congress first authorized payment of the $1 fee to detained witnesses, it did not also deem it necessary to exclude detained witnesses from entitlement to the general witness fee. Such an exclusion would have been necessary if Judge Cranch's interpretation was correct.

and 881, Rev. Stats., contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance.

In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, [is] yet so necessary to the administration of justice according to the forms and modes established in our system of government * * *.

See also *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597.

In *New York* v. *O'Neill*, 359 U.S. 1, in upholding the validity of the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, the Court noted that the obligation to testify, though personally burdensome, has been sustained "where it necessitated travel across the Atlantic Ocean. *Blackmer* v. *United States*, 284 U.S. 421." (359 U.S. at 7; footnote omitted). The Court then added that there is "no constitutional provision granting him relief from this obligation to testify

even though he must travel to another State to do so" (359 U.S. at 11). See, also *Blackmer* v. *United States*, *supra*, 284 U.S. at 438; Note, 43 Harv. L. Rev. 121, 122 (1929).[17]

Accordingly, contrary to petitioners' claim that the unavoidable detention of material witnesses is a "taking of property," it is clear that both Congress and this Court have always regarded the necessary detention of material witnesses as a public obligation or duty, necessary to the administration of justice and the public welfare. The Just Compensation Clause of the Fifth Amendment thus does not apply to the summoning or detention of a witness pursuant to court order.[18]

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[17] In enforcing an out-of-state subpoena in *National Labor Relations Board* v. *Gunaca*, 135 F. Supp. 790, 796 (E.D. Wis.), affirmed, 230 F. 2d 542 (C.A. 6), vacated as moot, 353 U.S. 902, the district court said:

"Any time any witnesses is served with a subpoena and compelled to attend as a witness at a trial in court or a hearing before any administrative agency, federal or state, he must leave his job, and if his job pays more than the witness fee, be deprived of that much of his income. If such were a sound basis for suppressing or refusing to enforce a subpoena, no judicial or administrative proceedings of any kind could be had."

[18] The related claim that detention at one dollar per day constitutes involuntary servitude is fully answered in the opinion of the court below which points out that the government in a variety of ways impinges on individual freedom of movement without infringing the Thirteenth Amendment, and that subjection to legal process cannot be regarded as violating that amendment. Moreover, the cases we have cited in the text clearly recognize the appropriateness of detaining witnesses when necessary to the administration of justice.

B. PETITIONERS WERE NOT DENIED EQUAL PROTECTION OF THE LAWS

In the district court, we pointed out in our answer to petitioners' complaint that "[w]henever a witness who is detained in custody is in attendance in court or before a United States Commissioner or before a person authorized to take his deposition," the statute entitles him to a witness fee of $20 "for each day's attendance" (App. 23). The court of appeals interpreted the statute in conformity with this view, holding that under Section 1821 "each incarcerated and nonincarcerated witness when in attendance in court receives $20 'for each day's attendance'" (App. 45). Accordingly, there can be no question here about disparate treatment of the detained and non-detained witness regarding their actual appearance in court." The sole issue is whether a detained witness is entitled to the $20 per day stipend even though he is not in attendance in court.

Congress could rationally conclude that the class into which petitioners fall should not receive more

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[10] Petitioners now claim that they were denied the opportunity to prove that they were not paid the $20 per diem fee "on many occasions when they give statements and testify for the Government in other Administrative proceedings" (App. 32).

We note that petitioners never offered any evidence to prove the above allegation prior to filing their cross motion for summary judgment (App. 34). Furthermore, at the hearing held on December 14, 1970, the following colloquy occurred (R. 22):

> The COURT. Do you want to add anything, any evidence?
> Mr. ARMENDARIZ. No, sir.

than the $1 per day fee. As material witnesses, petitioners had a duty to appear to testify, but a judicial officer determined that the only way to assure that they would fulfill this obligation was to detain them pending trial. The government must provide for the cost of food, lodging, and security for detained witnesses, but not for other witnesses. And detained witnesses are likely to be paid for considerably more days than nondetained witnesses. For example, a payment of 30 days detention at $21 per day would be $630.00, payable whether or not the witness would otherwise have been employed or employed at that rate. As the court below pointed out (App. 45):

> * * * governmental recognition of its interest in having persons appear in court by paying them for that participation in judicial proceedings, does not require that it make payment of the same nature and extent to persons who are held available for participation in judicial proceedings should it prove to be necessary. That the government pays for one stage does not require that it pay in like manner for all stages.

Moreover the named petitioners and those they purport to represent in this class action are all persons who have illegally entered the United States (see pp. 6–11, *supra*) and thus have themselves either been defendants in criminal prosecutions or subject to deportation proceedings, or perhaps granted the privilege of voluntary departure through government leniency. In this context, petitioners and their alleged class have an especially weak claim to being victimized by economic discrimination or deprivation under

Section 1821. There is no constitutional basis that we can see for their entitlement to any compensation during a reasonable period of confinement, and it is certainly not unreasonable or irrational for Congress to authorize a minimal sum as payment to deportable aliens.* There is no indication that illegal aliens, like petitioners, even if employed, would have earned wages averaging $20 or $21 per day for a period of 30 or 60 days or longer. If their average earnings would have been less than this, payment of $21 per day would serve as a chance bonus for illegal entrants who are apprehended and held as witnesses. Such a relatively large sum could therefore have the ironic

*With application at least to aliens who are *excludable and* subject to summary deportation, Congress has provided (8 U.S.C. 1227(d)):

"(d) Stay of deportation; payment of maintenance expenses. The Attorney General, under such conditions as are by regulations prescribed may stay the deportation of any alien deportable under this section, if in his judgment the testimony of such alien is necessary on behalf of the United States in the prosecution of offenders against any provision of this chapter or other laws of the United States. The cost of maintenance of any person so detained resulting from a stay of deportation under this subsection and *a witness fee in the sum of $1 per day for each day such person is so detained may be paid* from the appropriation for the enforcement of this subchapter. Such alien may be released under bond in the penalty of not less than $500 with security approved by the Attorney General on condition that such alien shall be produced when required as a witness and for deportation, and on such other conditions as the Attorney General may prescribe. (Emphasis added.)

The first version of this statute while permitting detention of deportable aliens made no provision for a witness fee or bail (Sec. 19, Act of March 3, 1903, c. 1012, 32 Stat. 1218). The House Committee report explained Section 19 as follows (House Report No. 982, 57th Cong., 1st Sess., p. 6):

effect of encouraging attempts at illegal entry." Illegal immigration inflicts financial loss, primarily on economically disadvantaged American citizens whose jobs

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"* * * any alien rejected as a contract laborer may be detained, if such detention is necessary, to be used as a witness on behalf of the Government in any suit which may be brought against the person or persons inducing his unlawful migration to the United States, the expense of such detention to be paid from the immigrant fund. The necessity for such legislation is due to the fact that the immediate return of such an alien deprives the Government of the principal, and sometimes sole, evidence available to maintain successfully an action against the contractor, under section 5 of this bill, which is a reenactment of section 3 of the act of February 26, 1885. * * *

Section 19 was reenacted in the Act of February 20, 1907, c. 991, Sec. 19, 34 Stat. 904, and subsequently amended by Act of February 5, 1917, c. 29, Sec. 18, 39 Stat. 888, which provided for a "witness fee" of one dollar per day while deportable aliens are detained as material witnesses; the amendment also broadened the objective of detention to include testimony for the United States "in the prosecution of offenders against any provision of this Act or other laws of the United States. In 1952, this provision was reenacted as Section 237(d) of the Immigration and Nationality Act, 8 U.S.C. 1227(d). Petitioners, however, were detained pursuant to Rule 46(b) of the Federal Rules of Criminal Procedure, not the above quoted section.

[11] The "family income of 77% of the people [in Mexico] is less than $80 a month." Hearings on Illegal Aliens, Before Subcommittee No. 1 of the House Judiciary Committee, 1971, 92d Cong., 1st Sess., 1972, p. 268 (hereinafter referred to as Alien Hearings); William Hughes, General Counsel, Ciudad Juarez, Mexico, Alien Hearings, 525 stated:

"The official minimum wage in the city of Juarez prescribed by the Mexican government is $2.89 a day in the central portions of the city, and $2.52 a day in the outlying barrios, or suburban communities. We estimate that about one-third of the work force in Juarez earn the minimum wage, and at least two-thirds earn less than the minimum wage prescribed. According to the best figures furnished us by the official statistician of the State Government of Chihuahua 2 days ago, 50 percent of the heads of families in

are taken by the illegal immigrants." House Report No. 92–1366, 92d Cong., 2d Sess., pp. 3–4, based on extensive hearings, stated:

> The adverse impact of over one million illegal aliens on the employment, Federal and State public assistance programs and the United States balance of payments, is overwhelming. With respect to the impact of such aliens on the domestic labor market, one witness from the Department of Labor noted, "Our experience leads us to conclude that these illegally employed aliens:
>
> 1. Take jobs which would normally be filled by American workers.
> 2. Depress the wages and impair the working conditions of American citizens.
> 3. Compete with unskilled and uneducated American citizens—the disadvantaged

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Juarez are unemployed. If you assume a typical family unit of six people, which is their figure, then you have about 86,000 family units in Ciudad Juarez, and of that group, 43,000 of the heads are unemployed."

[11] The congressional policy of requiring aliens—who because of their foreign nationality may be able to insulate themselves from the process of our courts—to post bond as a condition of entry into our country is also enforced against aliens lawfully entering the country, 8 C.F.R. 213.1, 8 U.S.C. 1102, and aliens held pursuant to a deportation proceeding, 8 U.S.C. 1252(a). If detained for want of security under 8 U.S.C. 1252 (a), the alien is not entitled to any fee.

to whom our manpower programs are directed.

4. Increase the burden on American taxpayers through added welfare costs by taking jobs which may be filled by persons on welfare, thereby thwarting our efforts to find jobs for these welfare recipients through such programs as the work incentive program.

5. Reduce the effectiveness of employee organizations.

6. Constitute for employers a group highly susceptible for exploitation."

It therefore does not "shock the conscience" that Congress has provided only a minimal "compensation" to detained deportable aliens who are held as material witnesses for a reasonably brief period of time. Whatever might be the legal consequence of the dollar per day limitation when applied to other material witnesses, petitioners and others similarly situated have little cause to protest that the statute is unfair or invidious when applied to them.

= Sheldon Greene, General Counsel, California Rural Legal Assistance, estimates the annual loss in wages to displaced California workers alone at $300 million annually. Alien Hearings 195; and see Greene, *Immigration Law and Rural Poverty—The Problems of the Illegal Entrant*, 1969 Duke L. J. 475, 478–482; *Diaz* v. *Kay-Dix Ranch*, 9 Cal. App. 3d 588, 88 Cal. Rptr. 443.

Since petitioners' constitutional arguments seeking an injunction against the operation of Section 1821 as construed and applied to them were properly treated as insubstantial by the courts below, the convening of a three-judge district court was not required. The action was correctly disposed of by a single district judge and affirmance by the court of appeals was in all respects warranted.

CONCLUSION

The judgment of the court of appeals should therefore be affirmed.

Respectfully submitted.

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